JAN 17 1995

No. 94-1064

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1994

JACK MA,
Petitioner,

vs.

TRW INC.,
Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MUNGER, TOLLES & OLSON
TERRY E. SANCHEZ
(Counsel of Record)
MARC T. G. DWORSKY
355 South Grand Avenue
Suite 3500
Los Angeles, California
90071-1560
Telephone: (213) 683-9100
FAX: (213) 687-3702
Counsel for Respondent

January 17, 1995

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review the California Court of Appeal's conclusion that TRW, a private corporation, did not become a state actor because its conduct in seeking to interview Petitioner regarding a potential security violation and in terminating him for refusing to appear without counsel at the contemplated interview was neither encouraged nor required by the government.

2. Whether this Court should grant certiorari to review the California Court of Appeal's conclusion that, even if TRW were a state actor, TRW did not violate Petitioner's Fifth Amendment privilege against self-incrimination by discharging him for his refusal to appear without counsel at a noncustodial interview.

TRW INC. SUBSIDIARIES AND AFFILIATES

Active Control Systems Limited
Comcred, S.A. de C.V.
Componentes Venezolanos de Direccion, S.A.
Fuji Oozx Inc.
Hopewell International Insurance Ltd.
United Insurance Company
Monitoring Technology Corporation
Moresa, S.A. de C.V.
Nippon Stud Welding Company, Limited
Rane Power Steering Limited
Servicred, S.A. de C.V.
Shin Han Valve Industrial Company, Ltd.
Sybase, Inc.
Toyoda TRW Automotive Inc.
TRW Australia Holding Limited
TRW-DAS, a.s.
Polimatic Eletrometalurgica Ltda.
Quality Safety Systems Company
TRW do Brasil, S.A.
TRW Module Systems S.A.
TRW Fuji-Serina Co., Ltd.
TRW Fuji Valve Inc.
TRW Koyo Steering Systems Company
TRW Keystone Powder Metal Products Company
TRW REDI Property Data
TRW Sabelt S.p.A.
TRW Seat Belt Systems (Poland) Ltd.
TRW Steering Co. Ltd.
TRW Steering & Suspension (Malaysia) Sdn. Bhd.
TRW Controls & Fasteners, Inc.
Wu Chou Valve Industrial Co., Ltd.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TRW INC. SUBSIDIARIES AND AFFILIATES	ii
STATEMENT OF THE CASE	2
A. TRW'S INTERNAL SECURITY INVESTIGATIONS	2
B. TRW'S ATTEMPTS TO INTERVIEW PETITIONER	3
C. THE PROVISIONS OF THE ISM	5
D. THE OPINION BELOW	5
REASONS FOR DENYING THE WRIT	7
I. CERTIORARI SHOULD BE DENIED BECAUSE THE LOWER COURT'S STATE ACTION RULING CORRECTLY APPLIED DECADES OF SUPREME COURT JURISPRUDENCE IN CONFIRMING THAT PRIVATE COMPANIES CAN COMPLY WITH THEIR CONTRACTUAL OBLIGATIONS TO THE GOVERNMENT WITHOUT BECOMING GOVERNMENT ACTORS	7

TABLE OF CONTENTS

Page

II. CERTIORARI SHOULD BE DENIED BECAUSE THIS COURT'S JURISPRUDENCE COMPELS THE CONCLUSION THAT TRW WAS NOT A GOVERNMENT ACTOR 9

A. Well-Established Supreme Court Jurisprudence Establishes That A Private Entity Only Becomes A Government Actor Where Its Conduct Is Specifically Dictated By The Government, Not Merely Because Its Conduct Furthers Some Important Federal Objective 9

B. Contrary To Petitioner's Assertion, This Court Has Not Tacitly Renounced The Principles Set Forth In The State Action Trilogy 14

III. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER ULTIMATELY SEEKS REVIEW OF THE LOWER COURT'S CONCLUSIONS OF FACT..... 19

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUE OF A PURPORTED RIGHT TO AN ADVISORY STATEMENT WAS NEITHER PRESENTED TO NOR DECIDED BY THE COURT BELOW 19

V. CERTIORARI SHOULD BE DENIED BECAUSE THIS COURT WOULD HAVE TO HYPOTHESIZE THE EXISTENCE OF A SERIES OF FACTS TO REACH THE ABSTRACT CONSTITUTIONAL QUESTION POSITED BY PETITIONER 21

TABLE OF CONTENTS

Page

VI. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER INVOKED ONLY A RIGHT TO COUNSEL, NOT THE SEPARATE PRIVILEGE AGAINST SELF-INCRIMINATION 23

A. A Demand For Counsel At A Noncustodial Interview Does Not Invoke The Privilege Against Self-Incrimination 23

B. Petitioner Seeks To Expand The Right To Counsel To Noncustodial Interviews, Contrary To Well-Established Precedent Of This Court 24

VII. CERTIORARI SHOULD BE DENIED BECAUSE EVEN THE STATE CAN PUNISH ONE WHO ATTEMPTS TO CIRCUMVENT THE INVESTIGATIVE PROCESS BY REFUSING TO APPEAR OR ASSERTING A BLANKET INVOCATION OF THE PRIVILEGE 26

A. This Court Has Held That The State Can Punish An Individual For Refusing To Appear Without Impermissibly Burdening The Privilege Against Self-Incrimination 26

B. Even If Petitioner Had Invoked The Privilege, Any Such "Blanket Invocation" Of The Privilege Is Legally Ineffective 29

VIII. CERTIORARI SHOULD BE DENIED IF THIS COURT CONCLUDES THAT EITHER THE STATE ACTION OR THE FIFTH AMENDMENT ISSUE IS NOT WORTHY OF REVIEW 30

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

	Page
Anglade v. Sprague, 822 F.2d 1035 (11th Cir. 1987)	29
Asherman v. Meachum, 957 F.2d 978 (2d Cir. 1992)	28
Baxter v. Palmigiano, 425 U.S. 308 (1976)	25
Becker v. Philco Corp., 372 F.2d 771 (4th Cir.), *cert. denied*, 389 U.S. 979 (1967)	18
Beckwith v. United States, 425 U.S. 341 (1976)	25
Blum v. Yaretsky, 457 U.S. 991 (1982)	8, 11, 12, 18
Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989)	21
California v. Beheler, 463 U.S. 1121 (1983)	25
Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961)	22
EEOC v. Federal Labor Relations Authority, 476 U.S. 19 (1986)	21
Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077 (1991)	14, 15, 16, 17
Edwards v. Arizona, 451 U.S. 477 (1981)	25
Fannon v. United States, 441 U.S. 948 (1979)	16
Grabinger v. Conlisk, 320 F.Supp. 1213 (1970) *aff'd*, 455 F.2d 490 (5th Cir. 1972)	28
Gulden v. McCorkle, 680 F.2d 1070 (5th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983)	27
Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)	8, 9
J.E.B. v. Alabama ex rel. T.B., ___ U.S. ___, 114 S.Ct. 1419 (1994)	15
Kitchens v. Bowen, 825 F.2d 1337 (9th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988)	13

TABLE OF AUTHORITIES

CASES

Page

Lefkowitz v. Cunningham, 431 U.S. 801 (1977) 27

Lefkowitz v. Turley, 414 U.S. 70 (1973) 27

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) 10, 11, 13

McKeesport Hospital v. Accreditation Council for Graduate Medicine Education, 24 F.3d 519 (3d Cir. 1994) 13

Minnesota v. Murphy, 465 U.S. 420 (1984) 23, 24, 25, 26, 27, 28, 29

Miranda v. Arizona, 384 U.S. 436 (1966) 6, 20, 25

Pinhas v. Summit Health, Ltd., 894 F.2d 1024 (9th Cir. 1989 (en banc), *cert. denied*, 498 U.S. 893 (1990) 13

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) 8, 12, 13, 18

San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987) 13

United States v. Carroll, 567 F.2d 955 (10th Cir. 1977) 29

United States v. Davis, 482 F.2d 893 (9th Cir. 1973) 15

United States v. Gumerlock, 590 F.2d 794 (9th Cir.), *cert. denied sub nom., Fannon v. United States*, 441 U.S. 948 (1979) 15, 16

United States v. Malnik, 489 F.2d 682 (5th Cir.), *cert. denied*, 419 U.S. 826 (1974) 29

United States v. Mandujano, 425 U.S. 564 (1976) ... 27

United States v. Ogden, 485 F.2d 536 (9th Cir. 1973), *cert. denied*, 416 U.S. 987 (1974) 15

United States v. Orleans, 425 U.S. 807 (1976) 8, 9

TABLE OF AUTHORITIES

CASES

Page

United States v. Rea, 678 F.2d 382 (2d Cir. 1982) ... 24

United States v. Solomon, 509 F.2d 863 (2d Cir. 1975) 8, 18

United States v. Stevens, 601 F.2d 1075 (9th Cir.), *cert. denied*, 444 U.S. 917 (1979) 18

West v. Atkins, 487 U.S. 42 (1988) 17, 18

Rules

California Rules of Court, Rule 29(b) 21

Statutes

Code of Federal Regulations, Title 32

Sec. 155 App. A 17

Sec. 155.4-155.6..... 17

Sec. 377.4..... 17

United States Constitution, Fifth Amendment ...6, 25, 28

No. 94-1064

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1994

JACK MA,
Petitioner,

vs.

TRW INC.,
Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In this state wrongful termination case, Petitioner alleged that his employer, TRW Inc. ("TRW"), deprived him of his constitutional right to an attorney when it terminated him for refusing to attend a work-related interview without counsel. The California Court of Appeal, applying well-established precedent of this Court, held that TRW was not a state actor, and that, even if it were, Petitioner had no right to counsel.

In order to secure effective relief from this Court, Petitioner ultimately must obtain a reversal of both of the foregoing rulings. However, neither was incorrectly decided and neither merits this Court's attention. The lower court's rulings rest upon a straightforward and correct application of

decades of this Court's precedent, do not conflict with any decision of this or any other court, and effect absolutely no change in the law. Further, although a contrary decision, heralding new rules of law that all defense contractors are subject to the Constitution in their employee relations or that employees have a right to counsel at noncustodial interviews, probably would raise an issue of national importance, the lower court's principled refusal to introduce any such new rules does not do so.

Further, for the first time, Petitioner attempts to raise a purported question whether TRW was required to provide an advisory statement respecting his privilege against self-incrimination. Even if this Court were inclined to consider that issue, this case is a poor vehicle for doing so because that issue never was raised below at trial or on appeal. Equally important, it is a purely hypothetical issue that is not presented by the facts of this case.

STATEMENT OF THE CASE

A. TRW'S INTERNAL SECURITY INVESTIGATIONS

TRW is a privately-owned company that, at times, contracts to provide goods and services to the United States Government. In connection with its contracts involving classified information, TRW entered into a contract with the Defense Investigative Service ("DIS"), an administrative agency within the Department of Defense. Under that contract, TRW agrees to safeguard classified information and maintain a system of security procedures in accordance with the DIS's Industrial Security Manual ("ISM"). Appellant's Appendix in Support of Petition for Writ of Mandate [hereinafter, "Rec."] at 709. Under the ISM, TRW also agrees to report certain security-related information for the government's independent investigation and evaluation. Rec. at 711. The procedures for implementing the ISM are

administered and executed entirely by TRW employees, subject only to periodic audits by DIS. Appendix to Petition for Certiorari ("Pet. App.") at A7-A8.

Generally, TRW conducts internal security inquiries by, among other things, informally interviewing employees. Rec. at 1407. Interviews are conducted in an open cubicle with five-foot-high partition walls and no door. *Id.* at 1405-09, 1893-96. It is undisputed that an employee may choose not to speak during a security interview and is free to leave at any time. *Id.* at 1408-09, 1895. TRW's security department has no police powers, and its investigators are not deputized, carry no weapons, wear no uniforms or badges, and make no arrests. Pet. App. at A9. Nor does TRW security have any authority to terminate an employee who refuses to answer questions. Rec. at 1410. It is "uncontroverted" that the government has absolutely no involvement in such interviews. Pet. App. at A9.[1]

B. TRW'S ATTEMPTS TO INTERVIEW PETITIONER

In November 1985, a fellow employee reported that Petitioner had made unreported contacts with foreign nationals, used sensitive language over the telephone, and

---

[1] Although Petitioner seeks to mischaracterize TRW's security investigations as the first step toward a "criminal prosecution" (*see, e.g.*, Petition at 17), the undisputed evidence is to the contrary. To begin with, even DIS — which promulgates the ISM — is not a criminal law enforcement agency and has authority to conduct only *administrative* investigations. Rec. at 710. Second, Petitioner's own expert admitted that in his 30 years of experience he *never* had seen a defense contractor's internal security investigation turn into a criminal prosecution. *Id.* at 1548-51. Third, the evidence established that "[i]f, during the course of an internal investigation TRW became aware of the potential for criminal charges, TRW would cease its investigation and notify the FBI; TRW had no participation in any subsequent investigation" that might occur thereafter. Pet. App. at A31-A32.

claimed to be the head of an international consortium of scientists studying "quantum gravity reversal" theory — an idea from the realm of science fiction. *Id.* at A9-A10. TRW undertook a routine investigation to determine if Petitioner had violated either its own internal security rule proscribing unreported contacts with *all* foreign nationals, or DIS's narrower rule regarding contacts with persons from certain designated countries. Rec. at 1391-92, 1404, 1419, 1889. As part of that investigation, TRW's investigator on the case attempted by telephone to arrange an interview with Petitioner at the latter's convenience. *Id.* at 1085, 1100. He assured Petitioner — and his counsel — that this was not a criminal investigation. Nonetheless, Petitioner refused to appear for the interview without his attorney. Pet. App. at A12-A13.

TRW then sent Petitioner a letter informing him of his duty to attend the interview and directing him to make an appointment or face termination. Petitioner never appeared for an interview. TRW subsequently reported to the Defense Industrial Security Clearance Office ("DISCO") (the government agency responsible for determining eligibility for clearances) pursuant to § 6b(1) of the ISM that Petitioner was alleged to have made unreported contacts with foreign nationals using sensitive language, and had refused to appear for an interview regarding those allegations. Pet. App. at A13-A14.[2]

After making this report, when it had no conceivable remaining responsibilities to the government, TRW — like any responsible employer — continued to seek to interview Petitioner to alleviate its continuing internal concerns. Rec.

---

[2] *After* Petitioner failed to attend the interview, TRW's investigator called the FBI as a precautionary measure to inform it of Petitioner's refusal to be interviewed regarding alleged foreign contacts. Pet. App. at A13. There is no evidence that the FBI ever undertook an investigation of Petitioner.

at 362. Petitioner continued to refuse to be interviewed by TRW without his counsel present.[3] *Id.* at 1204. Eventually, TRW terminated Petitioner for insubordination. Pet. App. at A14.

C. THE PROVISIONS OF THE ISM

The two provisions of the ISM arguably at issue in this case are sections 6b(1) and 7. TRW issued a report to DISCO pursuant to section 6b(1) of the ISM. Section 6b(1) requires contractors to "submit reports [to DISCO] . . . of *any* information coming to their attention" suggesting that security access may be inconsistent with the national interest. Rec. at 48-49 (emphasis added). The ISM nowhere requires a defense contractor to conduct any investigation *whatsoever* under § 6b.

Section 7 of the ISM requires "reports" of actual or suspected compromises of classified information, and that the contractor conduct a "preliminary inquiry" to ascertain the circumstances surrounding any such compromise. However, the ISM does not address whether the contractor should go so far as to interview the employee alleged to have compromised classified information, whether an employee has a right to counsel in connection with any such inquiry, or the consequences of an employee's failure to cooperate.

D. THE OPINION BELOW

Petitioner alleged that his termination for refusing to be interviewed without counsel constituted a wrongful discharge in violation of public policy. In order to prevail, Petitioner had to establish first that TRW was a government

---

[3]However, Petitioner met voluntarily, without his counsel, for 3½ hours with a DIS special agent to discuss these same issues. Rec. at 1206-16. TRW was not involved in the government's investigation in any way. *Id.* at 828-30, 1210, 1410. No criminal charges or civil citation ensued. *Id.* at 1232-33.

actor and, if so, that he had a right to counsel at the contemplated interview. The California Court of Appeal rejected both contentions.

The Court of Appeal held that the state action analysis turned on whether the particular conduct challenged by Petitioner was "specifically required or encouraged by the government." Pet. App. at A25. It concluded that this inquiry was not met. Specifically, the court concluded that, although § 7 of the ISM required TRW to initiate a "preliminary inquiry,"

> the ISM did not specify *how* this preliminary inquiry was to be conducted. The ISM did not even specifically require that an interview of the suspected employee be conducted much less mention the presence of counsel. Despite a myriad of detailed procedures [about other matters] specified in the ISM, Ma points to none which gives any direction concerning the participation of a lawyer.

Id. at A23 (emphasis original). The court observed that, quite apart from the ISM, the undisputed evidence confirmed that the government had absolutely no involvement in TRW's conduct: " '[The government] does not participate in, coordinate with or direct a contractor's internal security investigations, even if they are conducted to aid in [the contractor's] compliance with its reporting obligations under the ISM.' " *Id.*

Although unnecessary in light of its determination that TRW was not a government actor, the court below also unanimously rejected Petitioner's contention that he had a right to counsel at the TRW interview under *Miranda v. Arizona*, 384 U.S. 436 (1966). It held that although an individual has a Fifth Amendment privilege against self-incrimination, the right to the presence of counsel to implement that privilege does not arise absent a custodial

interrogation. Pet. App. at A27. The court found that because Petitioner failed to attend the interview, he had not been subjected to a custodial interrogation, and that, even if he had appeared, the interview would not have been custodial. *Id.* at A30-A32.

Petitioner also contended below that, under the Fifth Amendment, "the government has no power to punish an individual for refusing to voluntarily submit to interrogation." *Id.* at A32. The Court of Appeal unanimously dismissed this argument as "misconceived" and held that even the government may terminate an employee "who refuses to answer questions directly, specifically and narrowly related to the performance of the employee's duties." *Id.* at A33.[4]

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE LOWER COURT'S STATE ACTION RULING CORRECTLY APPLIED DECADES OF SUPREME COURT JURISPRUDENCE IN CONFIRMING THAT PRIVATE COMPANIES CAN COMPLY WITH THEIR CONTRACTUAL OBLIGATIONS TO THE GOVERNMENT WITHOUT BECOMING GOVERNMENT ACTORS.

Petitioner argues that the decision below somehow transforms the employment relations of thousands of Californian defense contractors and their employees by creating a purportedly "idiosyncratic rule . . . that, in California, defense contractors implementing a government-mandated security program are not state actors." Petition at 10-11. This assertion presupposes the existence of a contrary rule at some time, in some court, somewhere in this nation. Yet Peti-

[4]Petitioner subsequently sought a rehearing before the Court of Appeal and, thereafter, review by the California Supreme Court. Both requests were denied summarily.

tioner fails to cite any such authority, because no such authority exists. As discussed in Part II below, the cases in this Court are legion holding that mere obeisance to regulatory or contractual duties imposed by the government will *not* transform a private entity into a government actor. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982); *United States v. Orleans*, 425 U.S. 807, 815-16 (1976).

The lower court's fidelity to these precedents was neither novel nor remarkable. It concluded simply that TRW — like all other private defense contractors in this nation — was not a government actor when it sought to interview its employee regarding his bizarre and erratic behavior, and terminated him for failing to appear for an interview as directed. This decision wrought absolutely no change in the law.

Ultimately, it is Petitioner himself who seeks a revolutionary rule, one that indeed would unhinge the state action doctrine from its traditional moorings and thereby transform thousands of defense contractors (not to mention a vast array of other businesses that serve important public interests) into government actors.[5]

---

[5]Obligations similar to those imposed upon TRW by virtue of the ISM are the norm, not the exception, in today's regulatory society. As Judge Friendly observed in *United States v. Solomon*, 509 F.2d 863, 870 (2d Cir. 1975): "There would be a complete breakdown in the regulation of many areas of business if employers did not carry most of the load of keeping their employees in line and have the sanction of discharge for refusal to answer what is essential to that end."

II. CERTIORARI SHOULD BE DENIED BECAUSE THIS COURT'S JURISPRUDENCE COMPELS THE CONCLUSION THAT TRW WAS NOT A GOVERNMENT ACTOR.

A. Well-Established Supreme Court Jurisprudence Establishes That A Private Entity Only Becomes A Government Actor Where Its Conduct Is Specifically Dictated By The Government, Not Merely Because Its Conduct Furthers Some Important Federal Objective.

This Court long ago rejected the expansive conception of constitutional responsibility advocated by the Petitioner — that merely because a defendant is a large, regulated company whose business somehow furthers some important federal objective, such as the "national security effort," it thereby is transformed into a governmental actor.

For example, in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 354 (1974), this Court stated that:

> Doctors, optometrists, lawyers, Metropolitan [Edison], and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services "affected with a public interest." We do not believe that such a status converts their every action, absent more, into that of the State.

This conclusion was even more emphatically expressed two years later, in *United States v. Orleans*, 425 U.S. 807, 815-16 (1976):

> Billions of dollars of federal money are spent each year [on government contracts]. These contractors act for and are paid by the United States. They are responsible to the United States for compliance with the specifications of a contract or grant, but they are largely free to select the means of its implementation. . . . Similarly, by contract, the Government may fix the specific and

> precise conditions to implement federal objectives. Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs . . . into federal government acts.

Under these precedents, TRW cannot be held to be a government actor based upon some vague and visceral generalization about its purported role in "implementing a government-mandated security program." Petition at 10.

Instead, as this Court's jurisprudence makes clear, TRW cannot be held to be a government actor unless the *specific* conduct complained of by the Petitioner here can be ascribed to a *rule of conduct imposed by the government.* As the court below properly concluded, the record is bereft of evidence that the government was responsible for the particular conduct of which Petitioner complains, *i.e.*, TRW's directive that Petitioner appear without counsel for an interview and its decision to terminate him for refusing to appear. In making these decisions, TRW acted as a private employer, not the federal government.

The starting point of any state action analysis is the trilogy of cases decided by this Court in 1982, in which this Court comprehensively restated the principles governing this inquiry. In the first case, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court held that two distinct requirements had to be met before private conduct could be ascribed to the state:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State *or by a rule of conduct imposed by the State* or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or

> because his conduct is otherwise chargeable to the State.

Id. at 937 (emphasis added).

In the second case, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), the Court succinctly unified these requirements: "[C]onstitutional standards [can be] invoked only where it can be said that the State is *responsible* for the *specific* conduct of which the plaintiff complains" (first emphasis original). The Court explained that "[m]ere approval of or acquiescence in" private conduct will not satisfy the requirement of state "responsibility"; to the contrary, the state must have "exercised coercive power or ha[ve] provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.*

As the Court of Appeal here recognized, *Blum* is dispositive of this case. In *Blum*, patients of government-funded private nursing homes challenged decisions, made pursuant to government cost-reduction regulations, to transfer them to facilities offering lower levels of nursing care. The nursing homes received more than 90% of their funding from the state, and were heavily regulated. The regulations provided *detailed* direction on the substantive criteria — set forth in a governmental questionnaire — by which the physicians were to make the transfer decisions, *as well as the procedure to be followed* by the physicians. The state regularly inspected the homes to ensure that the level of care selected was appropriate, and retained the power to direct transfers whenever it determined the level of care was too high. It even had the power to fine or disqualify nursing homes that did not implement the cost-control program properly. Finally, the state implemented the decisions by reducing the level of Medicaid payments made on behalf of transferred patients, and thus benefitted from the decisions.

Despite the overwhelming state involvement in the decision-making scheme, this Court held that there was no state action because the state was not "responsible" for the *specific* transfer decisions at issue. Although the state questionnaires set forth the criteria for those decisions, "the physicians, and not the forms, make the decision about whether the patient's care is medically necessary." *Id.* at 1006-07. Similarly, although state officials reviewed the assessment forms, they did not "approve or disapprove decisions either to retain or discharge particular patients." *Id.* at 1010.

The final case in the trilogy is equally apposite. In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), defendant was a state-funded private school that was required by state regulations to maintain written job descriptions and personnel standards and procedures. As a condition of the school's receipt of funds, the state also had to approve all hiring decisions. Plaintiff, a vocational counselor, alleged retaliatory discharge in violation of the Constitution. This Court dismissed plaintiff's "public function" argument, reasoning that:

> The school, like the nursing homes [in *Blum*], is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. *Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.*

Id. at 840-41 (emphasis added). The Court then rejected the plaintiff's state action claim because the specific discharge decision at issue was "*not compelled or even influenced by any state regulation.*" *Id.* at 841-42 (emphasis added).

Under these precedents, the indispensable requirement for state action is government coercion or significant encouragement of the *specific* activity challenged. This Court has adhered strictly to this guiding principle. *See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 546 (1987) (the USOC was not a government actor because, although it served a national purpose, received its charter from Congress, was funded and extensively regulated by Congress, and had received from Congress the statutory right to sue to enforce its government-granted monopoly over the word "Olympic," the government did not influence the USOC's *specific decision* to sue to enjoin the use of the word "Olympic" by this particular plaintiff).[6]

"Applying these precedents here" (Pet. App. at A23), the court below correctly held that the determinative inquiry was whether the government "required or encouraged the particular deprivation of which Petitioner complains" — TRW's decisions to interview Petitioner without counsel and terminate him for not appearing. *Id.* Because neither the ISM nor the record supported the inference that the government had even the slightest role in TRW's conduct, the court below correctly concluded that "even though TRW's

---

[6]The lower courts, too, have remained faithful to the precepts set forth in the trilogy. *See, e.g., McKeesport Hospital v. Accreditation Council for Graduate Medical Education*, 24 F.3d 519, 523 (3d Cir. 1994) (recognizing that the principles identified in the "Supreme Court's . . . trilogy" must guide any analysis of state action issues); *Kitchens v. Bowen*, 825 F.2d 1337, 1340 (9th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988) (same). A particularly apt case is *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1034 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 893 (1990) (physician's discipline did not constitute state action even where the disciplinary decision was made pursuant to a state-mandated review process, and the hospital was required to report adverse determinations to the state, because the state had not "exercised coercive power or encouraged the [Petitioner's] removal in any way").

possession of classified information is subject to TRW's contractual relation with the federal government, TRW's conduct in this case was private, not specifically required or encouraged by the government, and . . . not subject to the [Constitution]." *Id.* at A25.

B. Contrary To Petitioner's Assertion, This Court Has Not Tacitly Renounced The Principles Set Forth In The State Action Trilogy.

Petitioner contends that this Court has tacitly renounced the principles set forth in its 1982 trilogy. Nothing could be further from the truth. The purportedly "conflicting" decisions cited by Petitioner faithfully adhere to the principles set forth in the trilogy and are fully consistent with the decision below.

(i) The *Edmonson* Decision: In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077 (1991), this Court held that, by exercising peremptory jury challenges in a racially discriminatory manner, defendant violated the equal protection rights of prospective jurors. Far from rejecting the trilogy, this Court in *Edmonson* applied precisely the same test first articulated in *Lugar*:

> [F]irst, whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority . . . and second, whether the private party charged with the deprivation could be described in all fairness as a state actor.

Id. 111 S.Ct. at 2082-83 (*expressly* citing *Lugar*, 457 U.S. at 937). Notably, this also was the very test the court below applied in disposing of this case.

Moreover, Petitioner cannot meet either part of the *Lugar/Edmonson* inquiry. With respect to the first part, this Court in *Edmondson* held that the use of peremptory challenges was purely a creature of federal law. 111 S.Ct. at

2083. Here, the government neither compelled nor conferred upon TRW the "right or privilege" to interview its employees, much less to do so without counsel or terminate them for insubordination.

With respect to the second part, this Court found state action in *Edmonson* because the specific conduct engaged in would not have been possible without the "overt, significant participation of the government," as evidenced by the statutory framework governing jury selection, the involvement of the district courts and the Administrative Office of the United States Courts in creating procedures for such purposes, and the "direct and indispensable" control of the trial judge over such procedures. 111 S.Ct. at 2084-85.[7] Here, as the Court of Appeal correctly concluded, there was no government involvement whatsoever in TRW's conduct. *Conspicuously, not one single word of the Petition even addresses this critical inquiry.*[8]

---

[7]Indeed, it is this precise holding that this Court, and the lower courts, have taken to be the *ratio decidendi* of *Edmonson*. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, ____ U.S. ____, 114 S.Ct. 1419 (1994) (*Edmonson* proscribes the state's "sponsor[ship]" of or "participation in" the perpetuation of invidious stereotypes) (*id.* at 1421, 1427); *McKeesport Hospital*, 24 F.3d at 524 (*Edmonson* confirmed that the "applicable standard" for state action depends upon whether the private party received " 'overt, significant assistance' " from the state or "acted . . . in concert with state officials").

[8]Petitioner's reliance on *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973), is similarly misplaced. In *Davis*, the FAA issued directives mandating personal security searches and specifying in detail *who* could conduct the searches and *how*. Petitioner neglects, however, to cite the subsequent cases refusing to extend *Davis* to constitutionalize conduct going even one step further than *specifically mandated* by the FAA. *See, e.g., United States v. Ogden*, 485 F.2d 536, 538 (9th Cir. 1973), *cert. denied*, 416 U.S. 987 (1974) (baggage searches, although serving the FAA's anti-hijacking concerns, not state action because not specifically "directed or authorized by any federal regulation"); *United States v.*

Instead of applying the principles reaffirmed in *Edmonson*, Petitioner invites this Court to focus exclusively upon the statement in *Edmonson* that it is relevant to the state action analysis to consider the extent to which the private entity relies upon government assistance, whether it performs a traditional public function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority. 111 S.Ct. at 2083.

These other factors do not affect the result here. For example, the Court in *Edmonson* reasoned that the defendant there had been delegated a function traditionally reserved to the government, namely, determining representation on a governmental body (the jury). *Id.* at 2085. Petitioner simply echoes this by asserting that TRW "assum[ed] . . . the traditional governmental functions of national defense." Petition at 17. Needless to say, there is nothing in the record to suggest that TRW either makes or implements national defense policy. Further, the acts TRW engaged in here — seeking to interview its employee respecting potential misconduct, and disciplining him for noncooperation — are manifestly not the prerogatives of government; they are part and parcel of running any private business.[9] Similarly, this Court in *Edmonson* indicated that the incidents of government aggravated in a unique way the injury suffered by the prospective jurors because "[f]ew places are a more real expression of the constitutional

---

Gumerlock, 590 F.2d 794, 799 (9th Cir.), *cert. denied sub nom., Fannon v. United States*, 441 U.S. 948 (1979) (same, regarding cargo searches).

[9]Petitioner's attempt to divorce the "public function" inquiry from the particular conduct he challenges renders his analysis meaningless. If such abstract characterizations could serve as the touchstone for governmental status, then every aspect of every defense contractor's business would be subject to the Constitution. Indeed, by parity of reasoning, any private business affected with a public interest would be subject to the Constitution. As noted earlier, this Court has emphatically rejected this dangerously expansive proposition.

authority of the government than a courtroom, where the law itself unfolds. . . . Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there." *Id.* at 2087. By contrast, the government played absolutely no role, not even a symbolic or incidental one, in TRW's conduct.

(ii) The *West* Decision: In *West v. Atkins*, 487 U.S. 42 (1988), this Court held that when the state contracts with a physician to discharge the state's affirmative constitutional obligation to provide medical services to prison inmates, the physician becomes a state actor. *Id.* at 54-55. As the Court explained, the state cannot evade its constitutional obligations simply by delegating them to private parties. *West* has no bearing here because the government has no constitutional obligation to interview employees of entities with which it contracts, or to discipline such employees in their employment.

Even assuming that the government had some such obligation, the record precludes any inference that it delegated this duty to TRW. As Petitioner expressly conceded in the court below, the government does *not* delegate to defense contractors its investigative function (or, indeed, its evaluative or adjudicatory functions), but jealously retains this function for itself. Return to Petition for Extraordinary Writ, at 11 n.6.[10] The ISM is not to the contrary; as already noted, it imposes upon contractors a general duty of inquiry, but no

---

[10]The regulations specify that DIS — not the contractor — is responsible for conducting security investigations (32 C.F.R. § 377.4), making determinations regarding the granting or revoking of security clearances, and conducting certain adjudicatory hearings (32 C.F.R. § 155.4-155.6 and App. A to Section 155). After receiving a contractor's report, DIS evaluates the information, *conducts its own administrative investigation*, if necessary, and determines whether an employee should retain a clearance. Rec. at 711 (emphasis added).

obligation to interview employees or deny counsel at such interviews.[11]

(iii) The *Becker* Decision: In *Becker v. Philco Corp.*, 372 F.2d 771 (4th Cir.), *cert. denied*, 389 U.S. 979 (1967), which predated the trilogy, the Fourth Circuit held that because a defense contractor had a mandatory duty to share confidences with the government pursuant to the *reporting* requirements of an earlier version of the ISM, it partook of the government's immunity to liability for defamation in connection with such reports. *Id.* at 774. Whatever the merits of that decision, the Fourth Circuit did not even discuss, much less decide, the entirely different question whether the contractor was subject to constitutional constraints under the "state action" doctrine. Moreover, even if TRW theoretically could be a government actor for the limited purpose of making a compulsory report, that conclusion has no bearing here. The conduct challenged here is *not* the making of the report, but rather TRW's insistence upon interviewing Petitioner without counsel.[12] As already noted, the ISM does not even mention the topic of employee interviews.

---

[11]Petitioner contends that this Court in *West* "limited" *Blum* and *Rendell-Baker* because the exercise of "professional judgment" by the physician in *West* did not preclude a finding of state action. As the Court in *West* explained, these cases simply were inapplicable because the physician there had been employed specifically "to fulfill the State's constitutional obligations" to provide that professional judgment. 487 U.S. at 52 n.10.

[12]The cases of *Solomon, supra*, and *United States v. Stevens*, 601 F.2d 1075 (9th Cir.), *cert. denied*, 444 U.S. 917 (1979), are apposite here. Both held that the mere existence of statutory reporting obligations did not transform private entities — the New York Stock Exchange and a bank, respectively — into government actors when they undertook internal investigations to obtain the requisite information, even if such investigations entailed questioning under threat of termination.

In summary, the conclusion of the court below that TRW was not a government actor in this case rested on a straightforward application of principles articulated by this Court in cases spanning two decades. This Court should not grant certiorari simply to reconfirm these well-accepted principles.

III. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER ULTIMATELY SEEKS REVIEW OF THE LOWER COURT'S CONCLUSIONS OF FACT.

Although Petitioner purports to raise a constitutional issue of some moment, he ultimately does nothing more than dispute the lower court's factual conclusion that there was a complete "absence of evidence that the government required or encouraged the particular deprivation of which [Petitioner] complains." Pet. App. at A23.

Petitioner's factual argument is easily met. One need only compare the Court of Appeal's detailed, six-page analysis of the obligations contractually imposed on TRW by the ISM (*id.* at A6-A9, A23-A24) against Petitioner's conclusory assertion — unsupported by any textual reference — that TRW engaged in a "government-mandated security interrogation." Petition at 17. Such a comparison reveals that Petitioner's version of the facts is inaccurate. But more important, purely factual inquiries such as this in any event do not merit this Court's attention.

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUE OF A PURPORTED RIGHT TO AN ADVISORY STATEMENT WAS NEITHER PRESENTED TO NOR DECIDED BY THE COURT BELOW.

Petitioner's wrongful discharge case is premised on the erroneous assumption that he had a constitutional right to refuse to attend the TRW interview without counsel. Petition at 9. Petitioner has been in constant search of a credible

constitutional theory to support this contention. His quest has led him now to seek certiorari on an entirely different basis than any presented to or considered by the court below. Certiorari should be denied for this reason alone.

In the trial court, Petitioner argued that his purported right to counsel arose under *Miranda v. Arizona*, 384 U.S. 436 (1966), because, he contended, the TRW interview would have been custodial. This was the sole basis for the trial court's Statement of Decision regarding a right to counsel. Pet. App. at A41-A46.[13] The Court of Appeal unanimously rejected this argument because Petitioner was not — and, had he appeared, would not have been — subjected to a custodial interrogation, the quintessential prerequisite to a right to counsel under the Fifth Amendment. Pet. App. at A26-A32. Petitioner has totally abandoned his *Miranda* argument here.

Petitioner also presented a new argument to the Court of Appeal: that his discharge impermissibly burdened his privilege against self-incrimination because " 'the Government has no power to punish an individual for refusing to voluntarily submit to interrogation.' " *Id.* at A32. The court unanimously rejected this argument as "misconceived" because the so-called "penalty cases" invoked by Petitioner hold only that "the government may not, upon threat of termination, require a public employee to speak *and* to waive . . . immunity from use in a subsequent criminal prosecution which would ordinarily attach to such a compelled admission." *Id.* at A33 (emphasis original). Because it was undisputed that TRW did not require Petitioner to waive immunity, these cases properly were held to be inapplicable here. *Id.* at A34.

---

[13]The Statement of Decision was prepared by Petitioner's counsel, yet contains no findings regarding any assertion of or burden on the privilege against self-incrimination.

In a desperate attempt to create an issue worthy of review, Petitioner now claims that his discharge for refusing to be interviewed without counsel impermissibly burdened his privilege against self-incrimination because TRW failed to advise him that his answers would not be used criminally against him. This new argument was not raised before or considered by either the trial court or the Court of Appeal.[14] Accordingly, nothing in the lower court's opinion addresses, much less decides, whether Petitioner would have been entitled to an advisory statement had he appeared for the interview.

This Court generally refrains from addressing issues not raised below. *See, e.g., Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 n.23 (1989); *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). This Court should apply this rule here to deny certiorari, because the Court lacks the benefit of any findings or analysis by the courts below respecting the purported constitutional issue raised by Petitioner.

V. CERTIORARI SHOULD BE DENIED BECAUSE THIS COURT WOULD HAVE TO HYPOTHESIZE THE EXISTENCE OF A SERIES OF FACTS TO REACH THE ABSTRACT CONSTITUTIONAL QUESTION POSITED BY PETITIONER.

There is a second reason why this Court should deny certiorari on the question whether an employer must advise an employee who invokes the privilege against self-incrimination that his answers cannot be used against him in a

---

[14]Petitioner first mentioned this purported issue in his Petition for Review to the California Supreme Court, which was summarily denied. As such, the issue was improperly presented under state procedural rules as well. *See* Cal. Rule of Court 29(b) (as a matter of policy, California Supreme Court normally will not consider "any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal").

subsequent criminal proceeding: the facts of this case simply do not raise that issue.

First, Petitioner never asserted the privilege against self-incrimination, but instead, the independent purported right to presence of counsel at the interview. *See* Part VI, below. Second, it is undisputed that Petitioner never appeared as directed for questioning, never was questioned, never invoked the privilege, and thus never was compelled to answer questions after invoking the privilege. Thus, in order to reach the purported constitutional issue here, this Court must assume — contrary to the evidence — a series of hypothetical events: that (1) Petitioner would have appeared for an interview; (2) the questions would have been potentially incriminating; (3) he would have invoked the privilege in response to such questions; (4) TRW would have required him to answer; (5) TRW would not have given an advisory statement; and (6) TRW would have discharged him for refusing to answer. *As a matter of undisputed fact, not one of these events occurred because Petitioner refused to appear for questioning in the first place.*

For sound prudential reasons, this Court typically declines to resolve constitutional issues based solely on hypothetical facts. *See, e.g., Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 71-72 (1961) ("No rule of practice of this Court is better settled than 'never to anticipate a question of constitutional law in advance of deciding it.' . . . Courts can most wisely determine issues precisely defined by the confining circumstances of particular situations"). It should decline to do so here, because any ruling on this issue would be entirely advisory in nature.[15]

---

[15]Notably, in every "penalty case" cited by Petitioner in which a court stated that some advisory statement was required, the individual actually appeared for questioning and invoked the privilege against self-incrimination. Petitioner did neither. As Petitioner's own attorneys candidly admitted: "We can only *speculate* what advice TRW would have given

VI. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER INVOKED ONLY A RIGHT TO COUNSEL, NOT THE SEPARATE PRIVILEGE AGAINST SELF-INCRIMINATION.

A. A Demand For Counsel At A Noncustodial Interview Does Not Invoke The Privilege Against Self-Incrimination.

The Fifth Amendment privilege against self-incrimination, except for limited exceptions not applicable here, is not self-executing. *Minnesota v. Murphy*, 465 U.S. 420, 434-36 (1984). Thus, an individual wishing to avail himself of the privilege must actually assert it. *Ibid.*

Petitioner never invoked the privilege against self-incrimination; he refused to appear for the interview based solely on a purported right to have his counsel present.[16] Indeed, far from asserting a right to remain silent, Petitioner admitted he would be "happy" to answer questions if his counsel were present at the meeting. Rec. at 1202.[17] Thus, Petitioner is forced now to contend that his demand for counsel somehow

---

him." Petition For Review to California Supreme Court at 25 n.8 (emphasis added).

[16]In his second amended complaint, Petitioner asserted that TRW violated public policy by terminating him for his "insistence upon *having his attorney with him* at any TRW security investigations." Rec. at 661 (emphasis added). He did not allege that he was discharged for asserting any privilege against self-incrimination.

[17]Indeed, Petitioner demanded counsel due to his deteriorating relationship with his employer, not any purported concern about incrimination. Thus, he admitted that he demanded that "all communications" be through his retained attorney *even prior* to learning of any potential security issue, *i.e.*, before any conceivable concern of incrimination. Rec. at 1149-50. In fact, he testified that he would not discuss *any subject* with TRW or even attend a New Year's Eve dinner with TRW's President without his lawyer. *Id.* at 1187. Moreover, he voluntarily met with a government agent to discuss the exact same issues without his attorney and without invoking the privilege. *Id.* at 1206-14.

sufficed to invoke the Fifth Amendment privilege against self-incrimination. He fails to cite any authority for this leap of logic because it is not the law. A request for counsel, *absent a custodial interrogation*, is insufficient to invoke the Fifth Amendment privilege against self-incrimination. *See, e.g., Murphy*, 465 U.S. at 424 n.3 (declining to address whether defendant's statement that "he felt like calling a lawyer" was an attempt to invoke the privilege because he had no right to an attorney during noncustodial interrogation); *United States v. Rea*, 678 F.2d 382, 390 (2nd Cir. 1982) (despite request for counsel, continued questioning by probation officers did not implicate parolee's Fifth or Sixth Amendment rights).

Here, Petitioner no longer contests the lower court's holding that the contemplated interview was noncustodial. *See* Pet. App. at A26-A32. Thus, his insistence upon counsel was not an invocation of the privilege against self-incrimination. Accordingly, this case raises no issue regarding a purported burden on that privilege.

B. Petitioner Seeks To Expand The Right To Counsel To Noncustodial Interviews, Contrary To Well-Established Precedent Of This Court.

Despite his attempt to characterize this as a case raising the question whether he was entitled to some type of advisory statement, Petitioner ultimately asserts, as he must to prevail, that he had a right to insist on the presence of his counsel at the contemplated interview "to help him safeguard his privilege against self-incrimination and exercise it intelligently." Petition at 26. But even if Petitioner properly had invoked the privilege (which he did not), he still had no constitutional right to insist upon counsel at the contemplated interview.

As discussed above, the right to counsel and the privilege against self-incrimination are independent rights. Just as a

request for counsel does not itself invoke the privilege, a proper invocation of the privilege does not create a right to counsel as a procedural safeguard to protect the privilege, except in a *custodial interrogation. See, e.g., Miranda v. Arizona*, 384 U.S. 436, 469-470 (1966); *California v. Beheler*, 463 U.S. 1121 (1983). As this Court stated in *Edwards v. Arizona*, 451 U.S. 477, 485-86 (1981), "[t]he Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right . . . ."

Accordingly, even allegedly coercive or intimidating questioning occurring in a noncustodial setting does not give rise to a Fifth Amendment right to counsel. *See, e.g., Minnesota v. Murphy*, 465 U.S. 420, 424 n.6 (1984) (parolee under statutory duty to appear and answer probation officer's questions has "no federal right to have an attorney present"); *Beckwith v. United States*, 425 U.S. 341 (1976) (individual not entitled to *Miranda* warning during accusatory but noncustodial questioning); *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (inmate retains right to remain silent but has no right to counsel during prison disciplinary hearing, despite potential criminal liability).

In sum, Petitioner's claim of entitlement to an advisory statement is a poorly disguised end-run around this Court's precedents limiting the Fifth Amendment right to counsel to custodial interrogations. Accepting Petitioner's reasoning would create an unprecedented expansion of the right to counsel to all types of noncustodial administrative investigations.[18]

---

[18]Petitioner appears to recognize the absurd implications of his own assertion when he asserts: "We do not suggest every interview of an employee by a public employer concerning any potential infraction triggers a full panoply of constitutional rights." But he offers no

VII. CERTIORARI SHOULD BE DENIED BECAUSE EVEN THE STATE CAN PUNISH ONE WHO ATTEMPTS TO CIRCUMVENT THE INVESTIGATIVE PROCESS BY REFUSING TO APPEAR OR ASSERTING A BLANKET INVOCATION OF THE PRIVILEGE.

Even if Petitioner's demand for counsel somehow implicated the privilege against self-incrimination, this case still raises no issue of an impermissible burden on the privilege because Petitioner did not appear for questioning, and did not assert the privilege in response to specific questions. Under this Court's precedents, Petitioner cannot rely on the privilege to preempt the entire investigative process.

A. This Court Has Held That The State Can Punish An Individual For Refusing To Appear Without Impermissibly Burdening The Privilege Against Self-Incrimination.

In *Minnesota v. Murphy*, 465 U.S. 420 (1984) — which Petitioner fails even to cite — a parolee contended that Minnesota law, which required him *to appear* for a parole interview *and answer questions truthfully* under penalty of parole revocation, improperly penalized his privilege against self-incrimination. This Court flatly rejected this argument, holding that the statute penalized the parolee's failure to *appear* for questioning, not his invocation of the privilege in response to specific questions.[19] In drawing this distinction, the Court analogized the parolee's statutory obligation to

---

standards for identifying when and under what circumstances public employees could refuse to appear for questioning without counsel.

[19]This Court specifically distinguished Petitioner's "penalty cases" on the ground that, in those cases, the employee not only was compelled to appear and testify, but *at the same time* was required to forego the privilege against self-incrimination. 465 U.S. at 434. Here, it is undisputed that TRW never attempted to force Petitioner to forego the privilege.

appear and answer questions to that of a person subpoenaed by a grand jury, noting that although the latter retains the right to invoke the privilege against self-incrimination in response to specific questions, he or she still has an obligation, punishable by contempt, to appear before the grand jury. Accordingly, Petitioner's contention that he could preemptively assert the privilege, and thereby avoid appearing for questioning, is precluded by *Murphy*.[20]

Nor do any of the "penalty cases" cited by Petitioner permit an individual to avoid appearing for questioning merely by asserting the privilege. Even in the cases in which the lower courts have opined that some advisory statement was appropriate, the employees, unlike Petitioner, appeared for questioning as directed and refused to answer questions based on the privilege against self-incrimination. *See* cases cited in Petition at pages 21 to 22. None of those cases applies here.[21]

Hence, there is no conflict between the Federal Courts of Appeals on the only question raised here, *i.e.*, whether a governmental employer may discharge an employee who refuses to appear for questioning as directed; it may do so. *See Gulden v. McCorkle*, 680 F.2d 1070, 1076 (5th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983) ("We . . . decline

---

[20]Indeed, Petitioner's contention requires an even greater leap of logic, since he claims he could preempt his appearance at the interview by insisting on the *right to presence of counsel*. Under that reasoning, a subpoenaed grand jury witness could refuse to appear by insisting upon presence of his counsel during questioning, despite the fact that he has no right to counsel before the grand jury. *See, e.g., United States v. Mandujano*, 425 U.S. 564, 578-81 (1976).

[21]Similarly, Petitioner's citation to *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), and *Lefkowitz v. Turley*, 414 U.S. 70 (1973), does not aid him. Petition at 22-23. In both cases the individuals appeared for questioning and were required to waive their immunity rights under threat of sanction.

to promulgate the rule . . . that would allow an employee, before he or she is required to respond to any questions, to circumvent an investigation proceeding by claiming generalized Fifth Amendment concerns prior to the time those concerns have developed in a particularized context"). *See also Asherman v. Meachum*, 957 F.2d 978, 982-83 (2d Cir. 1992) (en banc) (revocation of home release status for refusal to appear for interview does not violate privilege because adverse action was based on prisoner's attempt to foreclose any questioning); *Grabinger v. Conlisk*, 320 F.Supp. 1213, 1217-18 (1970), *aff'd*, 455 F.2d 490 (5th Cir. 1972) (disciplinary suspension of police officers for refusing to take polygraph test without counsel did not violate Fifth Amendment).

Not only was TRW's sanction far less coercive than parole revocation in *Murphy*, but there is no evidence that, had Petitioner appeared and invoked his privilege against self-incrimination in response to specific questions, he would have been penalized in any way. Indeed, the uncontradicted evidence before the trial court established that TRW security does not compel employees to answer questions. Rec. at 1408, 1895.[22] Accordingly, Petitioner's termination for refusing to comply with its directive that he appear for an interview without his attorney neither impermissibly bur-

---

[22]These facts dispose of Petitioner's unsupported assertion that he was faced with an "intolerable choice between submitting to TRW's interrogation and risking his liberty . . . and refusing to submit and forfeiting his job . . . ." Petition at 26. Petitioner had a viable *third option* — to consult with his attorney (*which he did*), appear as directed, and assert his privilege against self-incrimination to whatever questions, if any, he believed might incriminate him. Had he done so, *both* TRW's interest in having its employees follow its lawful instruction to appear and Petitioner's purported interest against self-incrimination could have been met. Moreover, this Court would then have a factual record on which to determine whether TRW would have penalized Petitioner's assertion of the privilege rather than his failure to appear.

dened his privilege against self-incrimination, nor raised any issue as to whether he would have been entitled to an advisory statement had he appeared as directed and asserted the privilege against self-incrimination.

B. Even If Petitioner Had Invoked The Privilege, Any Such "Blanket Invocation" Of The Privilege Is Legally Ineffective.

Reflecting the rationale and result in *Murphy*, the Federal Courts of Appeals consistently have held that, absent a custodial interrogation, one seeking to invoke the privilege may not simply assert a "blanket privilege" to avoid answering any questions or to excuse a failure to appear. Rather, one must assert the privilege in response to specific questions, so that a reviewing court can test the validity of the assertion on the basis of a factual record showing whether the questions asked tended to incriminate. *See, e.g., Anglade v. Sprague*, 822 F.2d 1035, 1037 (11th Cir. 1987) (rejecting defendants' attempt to justify failure to attend trial as an improper blanket assertion of the privilege); *United States v. Carroll*, 567 F.2d 955, 957 (10th Cir. 1977) (circuit courts have held with "great uniformity" that a blanket refusal to answer questions does not raise constitutional concerns); *United States v. Malnik*, 489 F.2d 682, 685 (5th Cir.), *cert. denied*, 419 U.S. 826 (1974) (individual must appear for questioning and specifically assert privilege as to particular questions; court will not speculate about what questions might have been asked). Thus, Petitioner's refusal to attend the interview, like a blanket assertion of the privilege, is legally ineffective to invoke the privilege or to excuse his failure to appear for questioning. Moreover, it deprives this Court of any factual record upon which to analyze the application of the privilege or to decide Petitioner's purported constitutional issue.

VIII. CERTIORARI SHOULD BE DENIED IF THIS COURT CONCLUDES THAT EITHER THE STATE ACTION OR THE FIFTH AMENDMENT ISSUE IS NOT WORTHY OF REVIEW.

The court below found that TRW was not a state actor, and that, even if it were, Petitioner had no right to counsel at the contemplated interview. Thus, in order to secure meaningful relief from this Court, Petitioner must show that *both* holdings below are worthy of this Court's review. Accordingly, if this Court finds that only one of these two issues merits review, then it nonetheless should deny certiorari because its review necessarily will prove irrelevant to the ultimate outcome here.

CONCLUSION

For each of the foregoing reasons, Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Dated: January 16, 1995

Respectfully submitted,

Terry E. Sanchez
(Counsel of Record)
Marc T.G. Dworsky

MUNGER, TOLLES & OLSON
355 South Grand Avenue
Suite 3500
Los Angeles, California
90071-1560
Telephone: (213) 683-9100
FAX: (213) 687-3702